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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/230,623	06/14/1999	STEPHEN MAY	P98.3235	4102

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EXAMINER

WEINSTEIN, STEVEN L

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 07/31/2002

17

Please find below and/or attached an Office communication concerning this application or proceeding.

AS-17

## Office Action Summary

Application No.

09/230623

Applicant(s)

MAY ET AL

Examiner

S. WEINSTEIN

Group Art Unit

1761

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- ☒ Responsive to communication(s) filed on 4/22/02
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- ☒ Claim(s) 1-10 is/are pending in the application.
- Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- ☒ Claim(s) 1-10 is/are rejected.
- ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- ☐ Claim(s) \_\_\_\_\_ are subject to restriction or election requirement

## Application Papers

- ☐ The proposed drawing correction, filed on \_\_\_\_\_ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some\* ☐ None of the:
- ☐ Certified copies of the priority documents have been received.
- ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
- ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

\*Certified copies not received: \_\_\_\_\_

## Attachment(s)

- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). \_\_\_\_\_
- ☐ Interview Summary, PTO-413
- ☐ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Other \_\_\_\_\_

Office Action Summary

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ohba ('252) in view of Poppel et al ('504) and applicant's admission of the prior art or vice, versa, that is Poppel et al and applicants admission of the prior art in view of Ohba, further in view of Waldburger ('254), McGonigle ('174), Cease ('537), Bliley ('086), Stover ('245), Rogers et al ('094) and Docker (EP 361893) further in view of Quaker Oats (Jap '174), QP corp ('677), QP Corp (174), Errass (EP '046) and Henkel (GB '234) essentially for the reasons detailed in the Office actions mailed 8/29/00, 4/3/01 and 12/12/01.

In summary , and in regard to claim 1, Ohba discloses a canned pet food comprising a base layer and an upper layer wherein the base layer and the upper layer remain stratified before serving and wherein the upper layer would be capable of supporting the base layer if the layers are inverted. Claim 1 differs from Ohba et al in the particular composition of the layers. Poppel et al and applicants' admission of the prior art teach that the composition of each of the layers is conventional. That is, applicants are not the inventor of solid pieces in gravy and they are not the inventors<sup>of</sup> the solid foodstuff. The recited base layer composition is readable on the conventional "formulated emulsion" with gravy and the solid foodstuff is readable on the conventional "meat loaf"; both taught by Poppel et al. Poppel et al and applicants' admission of the

prior art even teach that both compositions have even been packaged in the same container wherein the solid foodstuff envelops the formulated emulsion. To modify Ohba and substitute conventional compositions for other conventional compositions for their art recognized and applicants intended function would have been obvious in view of the art taken as a whole. It is noted that since Ohba already teaches maintaining food components stratified, and ~~a~~ since Poppel et al and applicants admission of the prior art teaches the formulated emulsion and solid foodstuff are maintained separated in their own way, it would have been obvious to maintain the formulated emulsion and solid foodstuff separate in the package. The art is replete with various examples of maintaining food and non food products in separate, distinct strata or phases for appearance in and out of the package wherein the phases or components are maintained separate without mixing by manipulating variables such as viscosity and density of the components. This is exactly applicants means of preventing mixing as well: "Due to the density and viscosity of the mixture of the solid food pieces and gravy and the density and viscosity of the settable foodstuff, clear and distinct layers are formed in the can" – page 8, para 1 of the specification. Finally, claim 1 and to a greater extent claim 10, recite that the components are placed in a container in a certain way, As disclosed, this is to allow the solid foodstuff to be removed from a container first with the formulated emulsion and gravy thereafter so that the latter is disposed on top of the solid foodstuff. The orientation of the components in a container (and consequently the orientation of the components upon being removed from the container) is seen to have been an obvious matter of choice in view of the art taken as a whole. Applicants

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objective is to provide a "visually attractive" product once removed from the container with an "attractive layer" of solid pieces of gravy above a clearly defined layer of a substantially solid foodstuff. As evidenced by Waldburger, etc. it is notoriously old in the art to position food components in a container so that when the container is inverted, the components are oriented one above the other in the preferred way. Not only is this concept notoriously old, it is also notoriously old in the art that most of the food products that are packaged this way include a liquid based product as the lower most layer in the container and a solid based product on top so that when the container is inverted, the liquid based product is presented on top of the solid based product. This is precisely applicants' objective as well. To therefore modify the combination and provide the recited sequence for its art recognized and applicants' intended function would have been obvious with no new or unexpected result derived there from. Docker is newly cited as further evidence of stratifying products (in this case a solid and a gravy containing solids) so that they empty out in the desired orientation. Similarly, employing Poppel et al, as the primary reference, it would have been obvious to modify Poppel et al and take the two conventional components and provide them in layers, which is shown to be conventional by Ohba, Waldburger and the art taken as a whole for applicants' objective of presenting visually attractive and useful arrangements.

Thus, applicants invention takes two food components which are conventional as taught by the art taken as a whole, orients them in separate layers which is taught by the art taken as a whole, and positions them in a certain sequence so that they are removed and positioned outside the container in a certain sequence which

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is also taught by the art taken as a whole so that "new and interesting textures and appearances" are provided. The textures are not new and the appearance of a liquid based product on a solid based product is also not new. The art taken as a whole teaches the combination would have been obvious. Applicants appear to imply that there is an unexpected result in that it is urged that the gravy apparently allows for easy dispensing of the solid food product. There is no support for this urging in the specification as originally filed. That is, the specification is silent as to this alleged advantage and there is no factual evidence on the record in this regard. It would appear, of course, that in order for the gravy to provide such a result, the gravy would have to be liquid to some degree and the solid food product would not fill the cross sectional space to completely block the space in a hardened fashion.

All of applicants' remarks filed 4/22/02 have been fully and carefully considered and is thought to have been responded to either above or in previous Office actions.

Any inquiry concerning this communication from the examiner should be directed to Steve Weinstein whose telephone number is (703) 308-0650. The examiner can generally be reached on Monday - Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-0661. The fax phone numbers for the organization where this application is assigned are (703) 872-10 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application should be directed to the receptionist whose telephone number is (703) 308-0661.

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Weinstein/LR  
July 22, 2002

COLLECTED  
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